Nos. 79-1711, 79-1754, 79-1760

In the Supreme Court of the United States

OCTOBER TERM, 1979

MIDDLESEX COUNTY SEWERAGE AUTHORITY, ET AL., PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

JOINT MEETING OF ESSEX AND UNION COUNTIES, PETITIONER

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

CITY OF NEW YORK AND ABRAHAM BEAME, PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. I) 1251 *et seq.*, and the Marine

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*Other petitioners in No. 79-1711 are Passaic Valley Sewerage Commissioners, Middletown Sewerage Authority, Bergen County Sewer Authority and the Linden Roselle Sewerage Authority.

The federal respondents are the Environmental Protection Agency, Russell E. Train, individually and as Administrator of EPA, United States Army Corps of Engineers, and Martin R. Hoffmann,

Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) 1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizen suit provisions of those Acts, 33 U.S.C. 1365 and 33 U.S.C. 1415(g).

2. Whether private parties can bring an action under the federal common law of nuisance.

3. Whether a cause of action under federal law against a state municipality is barred because of a failure to comply with the notice requirement of a state tort claims statute (Nos. 79-1711, 79-1754).

4. Whether a damage claim against a New Jersey sewage disposal agency violates the Eleventh Amendment (No. 79-1711).

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individually and as Secretary of the United States Department of the Army. Douglas M. Costle is now the Administrator of EPA and Clifford L. Alexander is now the Secretary of the Army.

Other respondents are Gosta Lovgren, New York Department of Environmental Conservation, Ogden R. Reid, individually and as Commissioner of the New York Department of Environmental Conservation, New Jersey Department of Environmental Protection, David J. Bardin, individually and as Commissioner of New Jersey Department of Environmental Protection, West Long Beach Sewer District, County of Westchester, Department of Environmental Facilities, City of Long Beach and City of Glen Cove.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a)[1] is reported at 616 F. 2d 1222. The opinion of the district court (Pet. App. 40a-67a) is unofficially reported at 12 E.R.C. 1118.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37a-39a) was entered on February 5, 1980. The petitions for a writ of certiorari were filed on April 29, 1980 (No. 79-1711), and May 5, 1980 (Nos. 79-1754, 79-1760). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent National Sea Clammers Association is an association whose members earn their living harvesting fish and shellfish in the Atlantic Ocean off the coast of New York and New Jersey. Respondent Gosta Lovgren is an individual member of the association. On January 14, 1977, these two respondents brought suit, on behalf of themselves and all others similarly situated, against petitioners and the other respondents in the United States District Court for the District of New Jersey (Pet. App. 41a, 43a).

The complaint alleges that petitioners discharge dredge spoil, sewage and other toxic materials into the Atlantic Ocean and its tributaries. The complaint further alleges that these discharges caused a massive growth of algae in 1976 in an area extending up to twenty miles offshore from Long Island to Cape May, New Jersey. When this algae mass bloomed and died it allegedly settled on the ocean floor, and its decomposition allegedly created an oxygen deficiency that caused severe damage to marine

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[1] "Pet. App." refers to the Appendix in No. 79-1711.

life in the area. The complaint charges that the discharges "have caused and continue to cause massive destruction of marine plant life, fish, clams, lobsters and other marine life unable to escape and thereby, has caused and continues to cause the collapse of the fishing, clamming and lobster industries which operate in the waters of the Atlantic Ocean." Complaint para. 39.

The complaint alleges violations of the Federal Water Pollution Control Act (FWPCA or "Clean Water Act"), 33 U.S.C. (& Supp. I) 1251 *et seq.*, the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. (& Supp. I) 1401 *et seq.*, other federal statutes and constitutional provisions, the federal common law of nuisance, and New Jersey and New York state statutes (Pet. App. 3a). The relief sought includes the imposition of fines and penalties against petitioners to be paid in part to the plaintiffs, and injunctive relief to prevent further dumping. In addition, the complaint seeks $250 million in actual damages and $250 million in punitive damages (Pet. App. 43a).

2. Petitioners and most of the other defendants moved to dismiss the claims under Fed. R. Civ. P. 12(b). The district court treated the motion as a motion for summary judgment and ordered the complaint dismissed with prejudice, except that some of the state law claims were dismissed without prejudice (Pet. App. 68a-70a).

The court dismissed the claims under the FWPCA and the MPRSA because the plaintiffs did not comply with the procedural requirements of the citizen suit provisions of those Acts, 33 U.S.C. 1365 and 33 U.S.C. 1415(g), in particular the requirement that 60 days' notice be given to EPA and to the alleged violator prior to the commencement of suit. The court also rejected the argument that an implied right of action exists under those statutes that is not subject to the specific requirements of the citizen suit

provisions and for which jurisdiction may be invoked under 28 U.S.C. 1331 (Pet. App. 49a-57a).

The court ruled that the federal common law of nuisance claim should be dismissed because private parties have no standing to bring such a claim (Pet. App. 46a-47a). The court also held that the plaintiffs' failure to comply with the notice provisions of the state statutes barred a tort suit against all but one of the petitioners (Pet. App. 62a-63a).[2] The court similarly found petitioners' maritime tort and other claims to be without merit and dismissed the complaint (Pet. App. 40a-67a).

3. The court of appeals reversed in part, reinstating the claims under the FWPCA and the MPRSA, the federal common law of nuisance and in maritime tort, and affirming the dismissal of the other claims.[3] The court ruled that private parties could maintain a federal common law of nuisance action under *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). The court held that, although that case involved a state as plaintiff, the federal action established was applicable whenever there is a "clear and overriding federal interest in uniformity," regardless of the identity of the parties (Pet. App. 25a). Thus, it held that the federal common law of nuisance provided the plaintiffs with a remedy for the damage allegedly suffered (Pet. App. 23a-29a).

With respect to the claim under the FWPCA, the court of appeals agreed that the plaintiffs had not met the requirements of the citizen suit provision of that statute.

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[2] The court did find that petitioner New York City had been given proper notice (Pet. App. 63a).

[3] The court vacated the dismissal of a claim under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and remanded it for reconsideration in light of further development of the record.

The court, however, held that they had an alternate basis for suit under Section 505(e) of the FWPCA, 33 U.S.C. 1365(e), invoking jurisdiction under 28 U.S.C. 1331. Section 505(e) is a "savings clause," reciting that the citizen suit provision does not "restrict any right * * * under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." Applying the analysis of *Cort* v. *Ash*, 422 U.S. 66 (1975), the court of appeals found that a private right of action should be implied under the FWPCA on behalf of individuals injured by pollution in violation of that statute (Pet. App. 12a-18a). This implied right of action, the court concluded, was "preserved" by the savings clause and therefore the plaintiffs could maintain their claims alleging violations of the FWPCA without reference to the restrictions imposed by the citizen suit provision.

The court of appeals then examined the similar citizen suit provision of the MPRSA and ruled that it was indistinguishable from that of the FWPCA for these purposes. Accordingly, it held that the savings clause of the MPRSA, 33 U.S.C. 1415(g)(5), also preserved an implied private right of action under that statute separate from the citizen suits authorized by 33 U.S.C. 1415(g)(1) (Pet. App. 18a-21a).

The court noted that the plaintiffs' failure to comply with the notice requirements of the state tort statutes did not bar suit on these federal common law and statutory causes of action (Pet. App. 35a n.49). It also rejected the contention of petitioners Middlesex County Sewerage Authority, Passaic Valley Sewerage Commissioners and Linden Roselle Sewerage Authority that the Eleventh Amendment required dismissal of the suit (Pet. App. 36a).

DISCUSSION

1. Petitioners contend (79-1711 Pet. 10-16, 79-1754 Pet. 7-11, 79-1760 Pet. 24-30) that the court of appeals erred in finding an implied private right of action under the FWPCA and MPRSA apart from the citizen suit provisions of those statutes. We agree and have also petitioned for certiorari on this issue. *Environmental Protection Agency, et al.* v. *National Sea Clammers Association, et al.*, No. 80-12 (filed July 3, 1980). For the reasons stated in our petition, we submit the present petitions for certiorari should be granted on this question.

2. Petitioners also contend (79-1711 Pet. 16-20, 79-1754 Pet. 12-15, 79-1760 Pet. 14-24) that the court of appeals erred in holding that private parties may bring an action under the federal common law of nuisance. In *Illinois* v. *City of Milwaukee*, *supra*, this Court held that Illinois had a federal common law remedy for injunctive relief against the City of Milwaukee to abate pollution of an interstate waterway. The Court focused on the fact that the plaintiff was a state government. The Court noted, however, that "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n.6. The question presented by petitioners is whether the remedy made available to a state in *Illinois* v. *City of Milwaukee* is also available to private plaintiffs.

A resolution of this issue is of very limited concern to the federal respondents in this case. The court of appeals focused on the question of a suit for damages, against which sovereign immunity protects the federal respondents. Moreover, to the extent that the complaint alleges an action for injunctive relief under the federal common law of nuisance, such an action does not lie against the federal respondents for their regulatory activity, which is the source of the plaintiffs' primary

complaint.[4] A common law nuisance may be created by a discharge of pollutants, but one is certainly not created by a regulation or permit issued by a federal agency in the course of administering a regulatory program.

The question of the standing of private parties to bring a federal common law of nuisance action is one that has occasioned some disagreement in the lower courts, but this case is the first definitive court of appeals decision on the issue. In *Committee for Consideration of Jones Falls Sewage System* v. *Train*, 539 F. 2d 1006 (4th Cir. 1976), the court rejected the plaintiffs' contention that they had alleged a claim under the federal common law of nuisance. The court focused on the fact that the alleged nuisance had no interstate effects because the pollution was confined to Maryland, although it also noted that *Illinois* v. *City of Milwaukee* involved only a state plaintiff and that the common law action was perhaps preempted by amendments to the FWPCA. Similarly, in *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275, 1281 (D. Conn. 1976), aff'd, 573 F. 2d 1289 (Table) (2d Cir. 1977), the plaintiffs' status as a private party was only one of three reasons why the court rejected a federal common law of nuisance claim. Accordingly, we do not believe that there exists at present a conflict in the circuits on this question that requires resolution by this Court.

Moreover, we believe that the court of appeals here correctly decided this issue. We do not agree with petitioners that a hard-and-fast rule should be established preventing private parties from ever invoking the federal common law of nuisance. The Court recognized in *Illinois* v. *City of Milwaukee*, *supra*, that the nature of the

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[4]The plaintiffs' allegations that they are being harmed by waste dumped by the Army Corps of Engineers might make out a prima facie nuisance claim to the extent it is not barred by sovereign immunity.

parties, as well as other considerations, may require application of federal common law. See 406 U.S. at 105 n.6. In some cases, certainly, the need for a federal common law action may depend upon the identity of the plaintiff. Thus, when a nuisance has only intrastate effects on a navigable water of the United States, a nuisance action under state law may be sufficient to vindicate the interest of a private plaintiff, whereas application of federal law might be necessary if the plaintiff were a state or the United States. Cf. *United States* v. *Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110, 120 (D. Vt.), aff'd, 487 F. 2d 1393 (Table) (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974). But where the nuisance affects an interstate body of water, creating a strong federal interest in uniformity, we see no reason why a private party should be barred from invoking the federal common law. In a situation where a federal remedy is appropriate, it should be available to any party. Although *Illinois* v. *City of Milwaukee, supra,* itself does not authorize suits by private parties, we believe that extension of its rationale to private plaintiffs is proper. In this case, where the affected body of water is the Atlantic Ocean, a federal remedy appears to be appropriate. Accordingly, although we did argue in the court of appeals, along with petitioners, that *Illinois* v. *City of Milwaukee* does not apply to private plaintiffs, we do not here contend that the court of appeals erred in its ruling on this question.

The question presented here, however, is one of substantial importance, and it is closely related to the question now before the Court in *City of Milwaukee* v. *State of Illinois,* cert. granted, No. 79-408 (Mar. 17, 1980). That case concerns the extent to which the federal common law of nuisance has survived in the wake of the 1972 amendments to the FWPCA. Indeed, petitioners in No. 79-1711 (Pet. 3, 21-24) and 79-1760 (Pet. 20-23)

alternatively raise that precise argument here, that the federal common law of nuisance has been preempted. The issue of the character of the plaintiffs who are entitled to bring an action under the federal common law of nuisance is a related subsidiary question if—as we urge—such an action is not wholly preempted.[5] Accordingly, we believe it would not be inappropriate for the Court to grant the petitions as to the question of private parties' standing to bring a federal common law of nuisance action.

3. Petitioners also contend (79-1711 Pet. 25-28, 79-1754 Pet. 15-19) that the plaintiffs' federal causes of action, if they exist, are barred by failure to comply with the New Jersey Tort Claims Act, N.J. Stat. Ann. § 59:1-1 *et seq.* (West Cum. Supp. 1980-1981). A state tort claims statute represents a limited waiver of sovereign immunity by the state. Suits under such a statute must be brought in accordance with the requirements of the statute. This limitation does not apply, however, to an action brought under federal law. Beyond the limited immunity conferred by the Eleventh Amendment, a state may erect no additional barriers to suits under federal law. Thus, unless the plaintiffs' causes of action are barred by the Eleventh Amendment, petitioners have no sovereign immunity defense, and the action is not dependent upon compliance with the New Jersey Tort Claims Act.

4. Petitioners do contend (79-1711 Pet. 28-30) that the plaintiffs' lawsuit is barred by the Eleventh Amendment. It is, however, well established that the bar of the Eleventh Amendment does not extend to counties or municipal corporations. See *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 280 (1977); *Lincoln*

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[5]Of course, if Milwaukee prevails and the Court finds that the federal common law of nuisance has been preempted, the question of whether private parties may bring such an action would disappear.

County v. *Luning*, 133 U.S. 529, 530 (1890). Petitioners are municipal corporations, some of which are created by counties (see N.J. Stat. Ann. § 40:14A-4 (West 1967)) and thus clearly do not enjoy immunity under the Constitution. See also N.J. Stat. Ann. § 58:14-2 (West 1966).

CONCLUSION

The petitions for writs of certiorari should be granted as to the question of an implied private right of action under the FWPCA and MPRSA. As to the question of suit by private parties, the petitions may appropriately be granted for consideration with *City of Milwaukee* v. *State of Illinois*, No. 79-408. In all other respects, the petitions should be denied.

Respectfully submitted.

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